84-891

NO.

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1984

JACQUELINE M. YARRINGTON, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
JOHN VOLZ, U.S. ATTORNEY
ROY F. BLONDEAU, U.S. ASST. ATTORNEY.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED

1. Whether the United States Justice Department/FBI or officials of same may lawfully maintain and publically disclose erroneous, harmful, unsubstantiated records on law-abiding citizens, thereby violating such citizens' civil and constitutional privacy and due process rights.

2. Whether the FOIA/PA Acts are bona-fide statutes requiring the observance of all governmental agencies, or may the United States Justice Department/FBI lawfully exempt themselves from their rules and requirements.

3. Whether under 42 U.S.C. 1986, the United States Justice Department/FBI, having knowledge of same, are lawfully obliged to extend aid equally to all citizens being victimized by unlawful conspiracies effecting deprival of their constitutional rights of privacy and liberty, or may they use preference in selection.

4. Whether the United States Justice Department/FBI may lawfully maintain secret files on non-criminal citizens, which said citizens may not peruse and thereby contest, thus effecting deprival of due process.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

NO.

JACQUELINE M. YARRINGTON, Petitioner

v.

THE UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Jacqueline M. Yarrington, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-12a) has not been reported. Rehearing was not requested. The opinion of the district court (App. B, 13a-20a) is not reported.

## JURISDICTION

The judgment of the court of appeals (App. A, 1a-12a ) was entered on September 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, statutes and regulations: U.S. Constitution, Preamble, Amend. I, Amend. IV, Amend. V, Amend. VI, Amend. IX; the FOIA Act, 5 U.S.C. 552; the PA Act, 5 U.S.C. 552a; 5 U.S.C. 701-706; 28 U.S.C. 1331(a); 42 U.S.C. 1985; 42 U.S.C. 1986; 28 C.F.R. 16.96; 28 C.F.R. 16.98. The pertinent tests of the foregoing are set forth in Appendix E,

## STATEMENT

1. Petitioner in 1979 requested of the FBI records maintained on herself for

many years, dating back to 1963, whereas she complained of a conspiracy to harass, racially and sexually motivated, and requested their aid, never accorded. Thirty pages were released to her Nov. 9, 1979, containing quotes attributed to herself, twisted out of context, that she had never said. She appealed for withheld pages and was granted six more pages, wherein she was characterized as a "mentally disturbed" person to whom aid was denied; identity of the informant and information that influenced this libelous, unsubstantiated estimation of herself was still withheld.

2. Petitioner commenced suit, pro se, to obtain withheld portions of her record in the U.S. Fifth District Court on July 15, 1980 (#80-2599). On January 21, 1981, Summary Judgment was declared in the government's favor, under the Privacy laws. Mr. John Volz, represented by Mr. Roy F.

Blondeau, handled the case for the U.S. Justice Department/FBI. Petitioner's appeal (#81-3104) was taken to Fifth Circuit Court by attorney, Cathy Leary, and was denied January 21, 1982. Also denied was a request for Panel Rehearing and En Banc, finalized March 2, 1982.

During proceeedings in District Court, the government violated her privacy rights by disclosing her files on court record, also injuring her lawsuit and her community standing; this portion had been released to her prior to lawsuit and was not the subject of her complaint, which concerned her withheld records, only. Her consent had not been requested nor given, nor was there 30 days advance notice in the Federal Register as required by 5 U.S.C. 552a (e) (11). Petitioner submitted a notarized computation of errors within her released file along with her District Court Summary Judgment papers, yet the government con-

tinued to quote profusely from same during litigation. Because"pro se"petitioner did not properly amend her complaint to request damages for unlawful disclosure, this was not considered by either court.

3. On February 1, 1982, she requested, appealed and was refused amendment of her record, finalized July 8, 1982, further injuring petitioner, including her future employment potential and thereby encouraging said harassment. At no time did the government vouchsafe proof of the integrity of the record they insisted on maintaining, nor justify their ruinous estimation of herself.

4. Petitioner filed suit (#82-4102) in Fifth District Court against the Justice Department, FBI, and responsible officials for illegal maintenance of, disclosure of, and refusal to amend her false record, and also, for refusal of aid in alleged cons-

piracy of harassment, all resulting in disastrous, provable injuries to herself. Dismissal was declared in government's favor, the Court deciding that the government was exempted from suit under the FOIA/PA Acts, and because of prescription and official immunity(February 15, 1984).

5. She filed notice of appeal, pro se, in Fifth Circuit Court (#84-3140) February 23, 1984. The court requested supplemental briefs of the government, suggesting that petitioner's case might have merit under the Privacy Act. However, in an unpublished opinion September 11, 1984, Appeal court ruled in government's favor, declaring that petitioner's only claim was under the PA Act, but that the government had exempted themselves from the provisions whereas they could be held culpable.

REASONS FOR GRANTING THE PETITION

This case is an important one for

citizens of the U.S. for reason that decisions are being made by governmental agencies that are eroding the constitutional rights of citizens, contrary to Amendment IX, and these are at times supported by the courts. Petitioner believes this to be true in her case: she has seen her rights to various constitutional amendments violated by the very government agency whose protection she sought and which she supports by her taxes; not only this, but the district and appeals courts have sustained them in this matter.

The FOIA/PA Acts, the very acts that were formulated to protect citizens from governmental abuse, were used as a vehicle to deprive her of the rights they were supposed to protect, namely, privacy! Yet, the Constitution is the "Mother of Laws", and no laws may be used so as to conflict with it; Amend. IV supports privacy.

Also, because of lack of governmental

aid, certain groups, commencing at Integration time in the area (1960), persisted in a conspiracy of harassment that continues to present day and did drastically change her life.

Thus, by the actions and inactions of the federal government, petitioner lost her rights of recourse, privacy, due process, liberty, under Amendments I, IV, V, VI and IX, leaving petitioner to wonder what has happened to the people's Bill of Rights!

1. Do the Justice Department/FBI have a constitutional privilege to maintain and disclose inaccurate, injurious records on a law-abiding citizen, when doing so violates said citizen's constitutional rights?

In this case the government insists on maintenance of a false, mis-quoted, harmful file on petitioner that serves no purpose, nor can they give a satisfactory reason for so doing. As a working woman

of modest means, unable to afford proper attorneys, she has gone to no little expense, time and effort litigating lawsuits herself in an effort to efface this stigmatic record on herself.

Petitioner has never belonged to any activist or subversive group of any kind. As a Yankee female, working in the South during a time of turmoil, she was an unfortunate victim of circumstances, being victimized by harassment in the form of verbal abuse by minority group members in the area after a racial incident at a place of employment in November of 1960, the same month and year of racial demonstrations at Frantz School, said harassment persisting to present day. Because she was not of this area, and there was resentment against Northerners prevalent at this time, other persons or groups in the area joined said conspiracy aimed at exciting hatred of herself, utilizing abusive language,

"gestures of contempt", vicious gossip,and threats.

Petitioner also had sound reasons for suspecting illegal surveillance effected on herself: by repetitions in public of comments made in the privacy of her domicile, by offensive comments somehow transmitted into her home by unknown means, certainly not an impossibility in this electronic age, particularly in view of harassment conspiracy on herself.

Except for one minor investigative action, whereas Mr. Gallinghouse in a letter dated February 26, 1976 in her files, stated there was no evidence of criminal activity, she received no federal aid. Influenced by withheld information by someone of apparent ill-will, her record depicted her as "mentally unbalanced; this libelous estimation of herself was given credance to by the fact that her comments in said files were deliberately distorted and mis-

quoted to make her appear as such. Petitioner had made honest claims of harassment, which the Justice Department knew very well existed, and, as proof, had many recordings of slurs and threats, plus accounts of many harrowing incidents associated with harassment, necessitating police calls.

Since record maintained on petitioner is false, incorrect, cannot be substantiated, contains no evidence of criminal harassment, no reason for maintenance can be claimed except to injure petitioner, which has been effected by loss of her lawsuit, injury to reputation and acceleration of harassment. She has maintained herself throughout, is a full-time working woman with part-time employment. Although her briefs are not the work of a trained attorney, they bear no similarity to the foolish phrases attributed to herself that she did not make, in her record.

Maintenance of false files was harm-

ful enough, but to add to her injuries, the government, represented by Mr. John Volz, chose to disclose this file on court record during prior court case(#80-2599), and to quote copiously from it throughout prior and present lawsuit. It was obviously disclosed with malicious intent, since it was not the subject of her complaint in that suit (only withheld files were); therefore disclosure was unnecessary; if deemed necessary, in fairness, this portion, already released to petitioner, could have been examined en camera, to spare her harm and embarrassment. In spite of her notarized listing of the errors in this file, government attorneys persisted in quoting them, as if factual. Even the Appeal court in both cases (Appendix-A, pages 3a and 4a ). stated that petitioner claimed that "surveillance cameras and listening devices were planted in her bedroom", and "voices of male co-workers were fed into her home

by some electronic means". This is a false statement; petitioner never made those claims as such. Apparently someone of ill-will deliberately distorted her statements to make her appear "unbalanced", and both the attorneys and courts harmed her by utilizing same. She had stated that she heard the voices of men making offensive comments somehow transmitted into her home by some electronic means (and a FCC pamphlet lists this as a means of electronic interference in domiciles), and also, that some of the voices ressembled those of male co-workers with whom she previously worked and who had acted in an abusive manner towards herself. This is only one example of a file of mis-quotes.

Circuit court also stated (App. A, page 9a ) that, "There was no public disclosure, but disclosure only to the requesting individual". This was an erroneous assertion. True, files were previously

released to herself, but she had no intention of publicizing these degrading files; however, the government's placing of these files on court record exposed them to the public, placing her in a false light to the public and to the judging court, thereby destructive of her privacy.

While these were not private papers stolen from her domicile, these were private, injurious files that should never have been maintained, and certainly never publically disclosed. If a place of business had published a similar document, they could certainly have been sued for the contents; why should the government be exonerated for a deliberate disclosure they knew to be untrue and harmful? Had the government really believed their own assessment of herself, they would have requested her to take a psychiatric examination before litigation proceedings.

Note that Appeal Court ignored her

claims of Constitutional violations: that the government's actions deprived her of Amendment I, the right to recourse; Amendment IV, the right to personal privacy; Amendment V, the right to due process; Amendment VI, the right to confront information deleterious to oneself and witnesses; and Amendment IX, guaranteeing that these rights should not be usurped by the government.

The Supreme Court, however, has looked with favor on Constitutional rights to privacy. This Court declared (43 L Ed 2d 871, 3):

> "The right of privacy...has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion."
>
> "The right of privacy is rooted in and exists in the penumbra of various specific constitutional provisions... the Fourth Amendment's prohibition of unreasonable searches and seizures (12, infra) and the Fifth Amendment's priv-

ilege against self-incrimination (13, infra). The right of privacy...has also been based on the Ninth Amendment's reservation to the people of rights not enumerated in the Constitution (14, infra)...Questions of privacy are also sometimes relevant in construing federal statutes..."

"...the court stated that publicity that places the plaintiff in a false light in the public eye is generally recognized as one of the several distinct kinds of invasions actionable under the privacy rubic...the court held that the defendants...had, by means of a newspaper article containing many inaccuracies and untruths, placed, knowingly or in reckless disregard of the truth, the plaintiffs in a false light before the public." Cantrell v Forest City Publ. Co.(1974) 419 US 245, 42 L Ed 2d 419, 95 S Ct 465.

"...the essence of constitutional liberty and security forbid all invasions of the sanctity of a man's home, 'and the privacies of his life'". Boyd v US (1886) 116 US 616, 29 L Ed 746, 6 S Ct 524; Interstate Commerce Com. v Brimson (1894) 154 US 447, 38 L Ed 1047, 14 S Ct 1125.

Among the many decisions of the Supreme Court upholding privacy under Amendments IV and V:

"...the court observed that the protection guaranteed by the Fourth and Fifth Amendments conferred, as against

> the government, 'the right to be let alone'--the most comprehensive of rights and the right most valued by civilized men,' and that to protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v US (1928) 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376, etc.

The Appellate Court also over-looked petitioner's claims under 5 U.S.C. 701-6 and under 28 U.S.C. 1331(a):

> "Doctrine of sovereign immunity is inapplicable where complaint alleges that government officer is acting outside his statutory powers or contrary to provisions of Constitution." Office of Econ. Opp. mployees Union v Phillips (1973, ND Ill) 360 F Supp 1092.

> "For purposes of a motion to dismiss for lack of jurisdiction, an action for injunctive relief against FBI, plaintiff's allegations of violations of personal constitutional liberties of assembly and petition are sufficiently grave to satisfy the $10,000 requirement of 28 USCS 1331." Fifth Ave. Peace Parade Comm. v Hoover(1971 DC NY) 327 F Supp 238.

Can the government rely on any law or statute so as to conflict with, or to deprive the people of their rightful claim to

the Bill of Rights?

2. Are the FOIA/PA Acts bonafide statutes requiring observance of all governmental agencies, or is the Justice Department/FBI privileged to exempt itself from same?

The FBI has made little attempt to hide its displeasure with these Acts, which often frustrate its criminal investigations. However, in civil cases, should the FBI be allowed to exempt itself from the regulations of these Acts in an attempt to hide wrongdoing in the department or mistreatment of citizens? Can a governmental agency or component of same, utilize departmental regulations to exempt itself from certain statutes; can it exempt itself from lawsuits for violations of these Acts? Where is their Constitutional privilege? If this be the case concerning FOIA/PA Acts, petitioner asserts that the Acts are a sham in protecting law-abiding citizens from

abuse by powerful government agencies, and if this is the case, should be nullified! It appears that the Justice Department/FBI can win any lawsuit under FOIA/PA by simply stating it is immune from suit, by a weak reliance on some portion of the Acts or another statute!

It is petitioner's opinion that she has been accorded shoddy treatment by the Justice Department/FBI, and that they have resorted to subterfuge that would be questionable for business concerns. First, consider the unsubstantiated, deleterious contents of her released records and their disclosure. Second, consider the fact that when sought, these records were in the New Orleans field office of the FBI and were during litigation transferred to the Central Systems location for "exemption" purposes. Third, consider the fact, the government liberally quoted statements attributed to petitioner that she had never made to win

their lawsuits. Fourth, they refused Amendment to her record, thus injuring her reputation and her standing in the community immeasureably, plus encouraging a conspiracy of harassment against herself. Fifth, they forced her into costly and time-consuming litigation that she has attempted herself to clear her good name.

Petitioner contends that Appellate Court did erroneously allow the government to exempt itself from the FOIA/PA Acts. First, the government cannot claim both the (j) and (k) exemptions in 5 U.S.C. 552a, since (k)(2), which alone bears relevancy to her records, states it excludes (j)(2). Note, that (j)(2) which they appear to favor refers to "criminal" investigatory records, yet the government claimed they found no evidence of"criminal"activity. Even should they quality for (j)(2), note that they are <u>not</u> exempt from certain other rules of the Act. They are not entitled to

(b)(3), which allows disclosure for a "routine use". The government's claim to a "routine use" is fraudalent: petitioner's record dates from 1963 and could not possibly have been compiled in anticipation of defense litigation against petitioner, plus the FOIA/PA Acts were not even enacted at that time! To qualify for "routine use", the records have to be used for the intention they were collected.* They are not exempt from (e)(6) requiring that before disclosure, that records are ascertained to be "accurate, complete, timely, and relevant", and the record is replete with errors, even petitioner's name was misspelled! They are not exempt from (e)(10) requiring the"confidentiality"of these records, so as not to cause injury or embarassment to person concerned, nor be unfair. Their"fairness" in disclosure was self-evident! Nor are they exempt from (e)(11) requiring 30 days notice, nor from

*PA, Sect 3(a)(7)

(i), which penalizes officers or employees that do not observe the rules of this Act. As United States Attorney in the area, Mr. John Volz was the government's main source of information, nor would they have acted without his advice.

Utilizing various regulations under 28 C.F.R. 16.96 and others, the government has managed to exempt itself from all the requirements of the FOIA/PA Acts as regards petitioners' records; therefore, in effect, exempting itself from these Acts, contrary to the intent of Congress that passed this statute. Since the FBI was one of the major offenders in violations of citizens' records, why should they be exempt?

Their claim to 28 CFR 16.96 was a weak one. Under (2), which was claimed, (i) and (ii) referred to "individual access", which disclosure to the public was not; (iii) stated that the government would not be required to amend records if this

entailed a "burden". Since petitioner has been a working woman throughout and has litigated her court cases, deciding she is "mentally competent" should not entail a burden. Why is this impossible to correct?

> "Congress has power to entrust final determination of facts in certain cases to administrative agencies...but administrative procedure in such cases must conform to requirements of procedural due process of law which require at least a hearing after notice and that findings are supported by substantial evidence and that decision is not arbitrary, capricious, or illegal." First Nat. Bank of Smithfield, NC v First Nat Bank of Eastern N.C. D.C. N.C. 1964, 232 F Supp 725, roog 352 F 2d 267.

> "Effect of provisions of Privacy Act (5 USC 552a (a)(5) is to permit disclosure where FOIA requires it, but to prohibit disclosure where that Act allows agency to refuse disclosure." Plain Dealer Pub. Co. v US Dept. of Labor (1979, DC Dist Col) 471 F Supp 1023.

Let the Court take notice that the Justice Department claimed 28 CFR 16.98 for exemption from inaccurate maintenance and correction, and circuit court did accede; yet this rule refers to "Exemption

of Drug Enforcement Systems"! This rule is not relevant to this case, since petitioner has never been a drug addict,nor is there any question of it; however, the usage of this exemption, which shows the extremes to which the government has gone to claim exemptions, will cast further slurs on petitioner's name.

If the Justice Department/FBI is able to exempt itself from all suits for violation of the FOIA/PA Acts even if they violate Constitutional rights, then these laws are not bonafide, should be repealed, and perhaps more stringent laws be passed.

3. Petitioner appealed to the Justice Department /FBI from the year 1963 until her first lawsuit in 1980 for aid against a conspiracy to harass, both sexual and racial in intent. In her opinion, she was singled out by radical groups for their civil right intentions, either to call att-

ention to their cause, or as a scapegoat on which to vent their frustrations and rage. Being a single female, not of this area, without relatives here and few friends, she was easily victimized for their purposes. That the Justice Department/FBI had knowledge of this harassment is self-evident. She believes their refusal of recourse was politically motivated; since the main instigators were of the minority group and federal authorities were engaged in assisting minorities, they preferred to ignore the situation.

Because of no deterent to the conspirators, harassment has persisted so long that now her privacy has been destroyed to the point she appears to be identified whereever she goes, and when alone, the object of scurrilous talk, threats, and "gestures of contempt." Harassers conspired to defame petitioner by verbal abuse, both sexual and racial in content, especially

aimed at inflaming Southern sensibilities; dissemination of vicious, untrue gossip encouraged others to join conspiracy. Prior to commencement of same, she could go about at liberty and peace, and worked in 12 various cities without harassment, as proof. Petitioner is white, and notes that whereas a citizen from the minority group subjected to racial harassment would receive aid, she received none. She was, indeed, informed by an FBI agent at commencement, that had she been a member of the minority race, she would have received aid. If aid is available to a citizen of the minority group and not to a caucasian under similar circumstances, there exists reverse discrimination.

The courts failed to consider her claims under 42 U.S.C. 1986, whereas she accused the Justice Department/FBI of knowingly refusing aid in a conspiracy of harassment against her. Since she had appealed

for aid from 1963 until her lawsuit in 1980 periodically, the requirement under 42 U.S.C. 1985, that they first be informed of conspiracy, was met. Because the government failed to aid, petitioner's life was drastically changed and will never be the same again.

4. Does the government have a Constitutional right to maintain secret files on law-abiding citizens? Should a law-abiding citizen have less rights than criminals who are allowed to know charges against themselves and face witnesses? Secret files might at times be necessary on those accused of crimes, but for non-criminals, wherein is the justification? Petitioner did not request withheld files in this suit, since in prior case, the appeal court decided she was not entitled to them; but there remains the question of whether the Justice Department/FBI may retain secret

files on non-criminals, especially when they have adverse effect, as in petitioner's case, where they appear to have affected the government's estimation of herself. Is this not tantamount to a trial wherein the accused person is not allowed to know the charges against him or to face witnesses, and contrary to Amendments V and VI? Is this non-Constitutional? Petitioner is convinced, considering the contents of her released files, that the withheld portion is also erroneous, probably accorded by a person of ill-will; yet she is unable to contest their contents or face the informants, being unknown. If they cannot be submitted to herself, they should be destroyed.

> "The Sixth Amendment gives to the accused in all criminal prosecutions the right to confront the witnesses against him. This right has been held to be a fundamental right which is binding upon the states by the Fourteenth Amendment." Pointer v Texas (1965) 380 US 400 13 L Ed 2d 923, 85 S Ct 1065.

While in civil cases the right of confrontation may not apply, the result is generally the same, because of the due process requirement. Where in the Constitution does the government find the right to deprive petitioner of due process by maintaining secret files on herself? For what purpose are they maintained?

## CONCLUSION

Although petitioner realizes that the small chances of her plea to be heard are minimized by the fact she is pro se, she prays for a chance to be heard. From her schoolhood days in Michigan she has been an idealist, with faith in the Constitution, believing it signified liberty and justice for all. Now she finds herself deprived of liberty by those that conduct themselves in lawless ways, and deprived of privacy by the very government agency whose protection she sought. She sought justice in the

courts, but found it not; she now seeks it in the highest court of the land, so that a wrong matter may be made right, and that justice may be done. She speaks for all of the citizens of this land who do not want to be deprived of their "Bill of Rights" by"big"government.

Petitioner submits her claim that she has been unfairly treated by the government she supports, and that the courts have sustained them in their error. To injure a citizen with quoted statements she did not make is foul play. Is this justice? Is this the manner in which a government elected "by the people and for the people" should comport itself?

A California court had this to say about rights:

"The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property and reputation. Any person living a life of rectitude has that

right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation." Melvin v Reid (1931) 112 Cal App 285, 297 P 91,93.

Respectfully submitted,

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Certificate of Service: I certify that all parties required to be served have been served by mail, postage prepaid: 40 copies to the Supreme Court Clerk, Alexander L. Stevens, Judicial Branch, Supreme Court of U.S, U.S. Supreme Court Bldg., 1-1st Street, N.E., Washington, D.C. 20543; 3 copies to Solicitor General, Depart. of Justice, Washington, D.C. 20530, within the required 90-day time limit, and Affidavit of Service is enclosed with clerk's copies.

Signed: Jacqueline M. Yarrington pro se

Appendix-A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-3140
Summary Calendar

JACQUELINE M. YARRINGTON, Plaintiff-Appellant,

versus

THE UNITED STATES DEPARTMENT OF JUSTICE, et al, Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(September 11, 1984)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

On September 16, 1982, Jacqueline M. Yarrington filed this suit in the United States District Court for the Eastern Dis-

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion not be published.

trict of Louisiana against the United States Department of Justice, the Federal Bureau of Investigation, the United States Attorney and an Assistant United States Attorney for the Eastern District of Louisiana, and several individual federal defendants. Yarrington alleged that the defendants had violated her rights under the United States Constitution and the Privacy Act, 5 U.S.C. 552a, by maintaining, failing to correct and releasing "false" records concerning her activities. She also alleged that certain defendants failed to aid her by failing to investigate and prosecute certain unnamed persons engaged in a conspiracy to persecute and harass her. In March 1983, the district court dismissed the complaint as to certain defendants. After the remaining defendants filed a motion to dismiss or, in the alternative, for summary judgment, the district court, on February 23, 1984, granted the motion

and entered judgment in favor of those defendants. Yarrington appeals. We affirm.

This litigation had its beginning in a 1963 visit by Yarrington to the United States Attorney's office in New Orleans. She was referred to the New Orleans field office of the FBI where she reported that co-workers at the printing company where she had been employed some two years earlier had organized to harass her, eventually forcing her to quit her job. She also complained of insulting and degrading remarks directed at her on public transit vehicles and said that she was sometimes followed by "Negro males."

Over the next sixteen years, Yarrington frequented the office of the FBI and the United States Attorney's office in New Orleans with reports that her telephone was bugged, that surveillance cameras and listening devices were planted in her bedroom, and the voices of male co-workers were fed

into her home "by some type of electronic devices." Usually, the appellant was told that her complaints did not involve matters of federal law.

On October 30, 1979, Harrington requested "under the Freedom of Information-Privacy Acts" the release of all documents pertaining to her from the files of the New Orleans FBI office. The New Orleans field office processed her request solely under the Freedom of Information Act(FOIA), 5 U.S.C. 552, and released fourteen documents comprising thirty pages. Certain material--principally names of confidential sources and Bureau employees--was excised from several pages on the ground that it was exempt from disclosure under the FOIA. See 5 U.S.C. 552(b)(7)(d), (D). Two other documents--two pages--also were claimed as exempt from disclosure and were withheld in their entirety.

After an administrative appeal to the

Attorney General, six pages containing material previously excised as exempt from disclosure uner the FOIA as "inter-agency or inter-agency memorand(a)," see 5 U.S.C. 552(b)(5), were again released without the earlier deletions. Otherwise, the decision of the field office deleting from the documents the names of Bureau employees and confidential informants, and refusing to release two documents, was affirmed.

Yarrington followed by bringing suit under the Privacy Act against the FBI, seeking the release in their entirety of all documents pertaining to her in the Bureau's files. The FBI's motion for summary judgment was granted by the district court. In granting summary judgment, the district court found that the FBI had complied with the Privacy Act when it furnished Yarrington with "everything except those things which are exempt under the law". After Yarrington appealed, this court affirmed the jud-

gment in an unpublished opinion dated January 21, 1982.

On February 1, 1982, Yarrington sent a letter to William French Smith, the Attorney General of the United States, in which she requested the amendment of the FBI records pertaining to her. She claimed they were "erroneous throughout and gave a false and very unfavorable view of (her)". Yarrington's letter was transferred to the FBI. After the FBI denied her request and after exhausting her administrative remedies, Yarrington began the present litigation.

Yarrington alleges violations of various constitutional rights, civil rights, and statutory rights under the Privacy Act. After reviewing her claims, we are satisfied that the only claim upon which she may have a cause of action is under the Privacy Act, 5 U.S.C. 552a(1975). Pursuant to the Privacy Act, Yarrington seeks to

compel the amendment and correction of FBI records concerning her and to recover civil damages for the FBI's alleged maintenance of inaccurate records concerning her.

Congress enacted the Privacy Act in 1974. The Act guarantees individuals access to certain agency records about themselves, see 5 U.S.C. 552a(b). The Privacy Act applies only to agency "records", which the Act defines as agency files or documents about individuals, contained in a "system of records", which is a group of agency records from which an agency retrieves information using the name of the individual or some other personal identifier. See 5 U.S.C. 552a(a)(4) and (5).

An individual's right of access under the Privacy Act, however, is not unlimited. Sections 552a(j) and (k) of the Act give agencies the discretion to refuse to disclose certain records. Under section 552a (j)(2), the head of an agency the princi-

pal function of which is law enforcement may promulgate rules exempting from access any system of records containing information compiled for the purpose of criminal investigation.[1]

The FBI has promulgated a regulation pursuant to Exemption (j)(2) that exempts its Central Records System from access to individuals and from the provisions of 5 U.S.C. 552a(d) and (g), those sections of the Act requiring an agency to amend or correct its records under certain circumstances and giving a civil remedy to an individual for damages for the inaccurate maintenance of records by an agency and for the failure of an agency to amend or correct inaccurate records once requested to do so.[2]

1. Access to material exempted from disclosure under the provisions of the Privacy Act cannot be reached in suits under the FOIA. Painter v FBI, 615 F.2d 689 n.3.

2. This regulation appears at 28 U.S.C. 16.98.

Even though the records in the FBI's Central Records System had been exempted from disclosure, the FBI had adopted a policy, codified at 28 C.F.R. 16.57 (1980), which allowed for disclosure of records pertaining solely to the requesting individual. Pursuant to this policy, and to the request of Yarrington for information pertaining soley to herself, the FBI disclosed to Yarrington certain records which pertained to her.[3] There was no public disclosure, but disclosure only to the requesting individual.

It could be argued that having disclosed the records to Yarrington, the FBI waived any right to claim the exemption provided by section 552a(j)(2) and must amend or correct the records it disclosed. We are not convinced, however, that the FBI has, by disclosing the records to

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3. Recently the Department of Justice has repealed 28 CFR 16.57 (1980).

Yarrington, waived anything beyond the specific exception it has allowed to its blanket exemption. The disclosure and amendment provisions of the Act are separable. Furthermore, Yarrington has cited no authority for the proposition that, because information has been disclosed to her despite the availability of an exemption, the defendant cannot claim the exemption for the amendment provisions. For these reasons, we hold that the FBI can exempt records from the amendment provisions of the Act regardless of whether the records have been disclosed.[4]

The FBI in 28 CFR 16.96(1980), pursuant to section 552a(j) and (k) of the Act, exempted its Central Records System from the provisions of section 552a(d), that section of the Act requiring an agency to

4. In so doing, we note that 28 CFR 16.57(a) (1980) provided that section 16.57 "is not deemed to be a waiver of the government's position that material in question is subject to all exemptions claimed in PA Act."

amend or correct its records under certain circumstances. As noted above, the disclosure of the records has no effect on this exemption. Therefore, the FBI is immune from a suit under the Act which seeks to amend or correct its records. Shapiro v DEA, 721 F.2d 215, 224(7th Cir. 1983), cert. granted, 52 U.S.L.W. 3720 (U.S. April 2, 1984).

With respect to Yarrington's claim for damages for alleged errors in the records concerning her that are maintained by the FBI, the FBI has exempted itself from section 552a(g) of the Privacy Act which provides for civil damages for inaccurate information contained in its records. Therefore, the FBI also cannot be held liable for inaccurate information contained in its records and is immune from suit under the Privacy Act for such damages.

For the above and foregoing reasons

the judgment of the district court is affirmed.

AFFIRMED

Appendix-B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JACQUELINE YARRINGTON — CIVIL ACTION
No. 82-4102
VERSUS — Section "J"

U.S. DEPARTMENT OF JUSTICE,
ET AL.

Motion by the United States to Dismiss or, Alternatively for Summary Judgment held in the above numbered and entitled cause before the Honorable Patrick E. Carr, presiding Judge on the 15th day of Feb., 1984.

APPEARANCES:

For Plaintiff:
JACQUELINE M. YARRINGTON, pro se
P.O. Box 6521
Metairie, Louisiana 70009

For the Defendant:
JOHN VOLZ, US Attorney
(By: William F. Baity, Esq.)
Assistant US Attorney
Hale Boggs Federal Bldg.
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New Orleans, Louisiana 70130

REPORTED BY: ARLENE MOVAHED, O.C.R.

PROCEEDINGS

THE CLERK: Civil Action No. 82-4102, Jacqueline M. Yarrington versus United States Department of Justice, Et Al.

MR. BAITY: Good morning, Your Honor, William Baity on behalf of the defendant.

THE COURT: I understand your position. I read the brief.

MR. BAITY: We have nothing further to add to that.

THE COURT: Miss Yarrington, do you have anything to add to your brief?

MISS YARRINGTON: Yes, I do. I have some exhibits.

THE COURT: Well, I can't consider evidence at all. This is a motion to dismiss as a matter of law so it is not an evidentiary hearing.

MISS YARRINGTON: Your Honor,the defendants are requesting dismissal or summary judgment in their favor. I am stating that there is no cause for dismissal and if there is summary judgment it should be in my favor.

One thing they have questioned is the jurisdiction of this case and I claim jur-

isdiction under the Constitutional Amendments 1,4,5,6 and 9 because of injury under these amendments.

Now, under 28 U.S.C. 1331 it states about constitutional jurisdiction that "Jurisdiction of Federal Courts where it depends upon character of cause embraces all cases in law and equity arising under the constitution and laws of the United States. This clause extends jurisdition of courts--

THE COURT: Where are you reading from? Aren't you reading from your brief?

MISS YARRINGTON: The quotation from Cohen v. Virginia case, 1821.

THE COURT: Are you reading from your brief?

MISS YARRINGTON: No, these are notes that I have. But this is listed someplace in my brief. But this is a quotation from Cohen v. Virginia, 1821.

THE COURT: I understand.

MISS YARRINGTON: And it states, "This

clause extends jurisdiction of court to all cases described without making in its terms any exception whatsoever and without any regard to condition of party."

I also claim 5 U.S.C. 701 up to six and the Freedom of Information Act and the PA Act. A letter from Jonathan Rose and Richard Huff states after refusal to amend if I wanted to contest refusal to amend the proper place was the Federal District Court.

Now I also claim these claims were for refusal to amend my file for the maintenance of falsified files and also for disclosure of this file. And I also claim that they have injured me because of the refusal to aid me in a conspiracy in this area to deprive me of my civil rights and that they knew of this conspiracy.

THE COURT: I understand, Miss Yarrington, what your contentions are. Of course, they contend that the complaint as far as the

constitutional rights are concerned are barred and they have prescribed and are barred by the doctrine of official immunity.

MISS YARRINGTON: Your Honor, I claim that they are not exempt from immunity. For one thing the FOIA/PA Act does state for officers that do not adhere to the specifications of the FOIA/PA Act that they can be sued and the agency can be sued also under 5 U.S.C. 552a.

THE COURT: Miss Yarrington, anybody can be sued but whether you can sustain that suit is something else. You can sue anybody you want to but you may get pushed out if you don't state a legal claim.

MISS YARRINGTON: The FOIA/PA Act wasn't that specifically written so that citizens could not be taken advantage of by governmental agencies?

THE COURT: It was written for the purposes set forth in the act.

MISS YARRINGTON: I beg your pardon.

THE COURT: It was written for the purposes set forth in the Act but that does not cover every claim that anyone may have. It must be specific.

MISS YARRINGTON: It does cover, though, maintenance of a file if they're harmful, injurious, or fictitious. It does cover disclosure if they do not adhere to the rule of disclosure and it does cover refusal to amend.

THE COURT: Miss Yarrington, I have read your briefs. I know what your position is. Insofar as your complaint against the attorney's office violated your constitutional rights those claims are prescribed by the prescription of one year and barred by the doctrine of official immunity.

MISS YARRINGTON: Well, Your Honor, I contest this also. For one thing the defendants did not check carefully into the time. Now my suit was filed in September 16, 1982.

Now the previous suit which was for to obtain withheld information in my file was sent to the Fifth Circuit Court. It was also--I had a lawyer representing me, Cathy Leary, and it was also set for a panel rehearing and en banc. Now the decision was finalized March 2, 1982. I then appealed for amendment on my file. Now had my files been amended, had they been thrown out as I requested, there would be no reason for this suit. But this was refused on July 8, 1982. Now until this time, July 8, 1982--until after that time I could not have made the suit. I had to first find out whether I would get the withheld files and then I would make a complaint concerning the files. So the timeness does not exceed a year. Now also the--

THE COURT: Miss Yarrington, I have gone over it and I have made up my mind. I am going to dismiss your suit because of prescription, official immunity and the records

here insofar as the FBI records are concerned are exempt from the Act. I am going to dismiss your suit. You re going to have to go across to the Fifth Circuit to see if you can convince them that you're right because you have not convinced me. Motions are granted. The suit is dismissed.

(End of motion)

## Appendix-C

## CONSTITUTIONAL AND STATUTORY PROVISIONS

1. PREAMBLE TO THE CONSITUTION:
"We the people of the United States, in order to form a more perfect Union, establish justice, injure domestic tranquility, provide for the common welfare, and secure the blessings of liberty to ourselves and our posterity do ordain and establish this Consitution for the United States of America."

2. AMENDMENT I: "Congress shall make no law ..abridging...the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. AMENDMENT IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

4. AMENDMENT V: "No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

5. AMENDMENT VI: "..the accused shall... be informed of the nature and cause of the accusation; to be confronted with the witnesses against him..."

6. AMENDMENT IX: "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

7. 5 U.S.C. 552 (FOIA):
(a)(1)(E)" Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner, be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published..."

(a)(4)(B) "On complaint, the district court of the US in the district in which the complainant resides...has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions..."

(a)(4)(E) "The oourt may assess against the US reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed..."

8. 5 U.S.C. 552a (Privacy Act):

"Sect 2.(a) The Congress finds that--
(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology...has greatly magnified the harm to individual privacy that can occur from any collection maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the US; and

(5) in order to protect the privacy of individuals identified by information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to--

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used without his consent;

(3) permit an individual to gain

access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements...only in those cases where there is an important public policy need...as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

Sect. 3 (a)

(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) CONDITIONS OF DISCLOSURE--No agency shall disclose any record...by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(d) of this section;

(d)...

(1) upon request by any individual to gain access to his record...to review the record...

(2)(B)promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete;or

(e) AGENCY REQUIREMENTS.--Each agency that maintains a system of records shall--

(1) maintain...only such information about an individual as is relevant and necessary...;

(2) collect information to the greatest extent practicable directly from the subject individual when information may result in adverse determinations about an individual's rights...

(5) maintain records...in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency...make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;...

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compul-

sory legal process when such process becomes a matter of public record;...
(10) establish appropriate administrative...safeguards to insure the security and confidentiality of records and to protect against any... hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and
(11) at least 30 days prior to publication of information...publish in the Federal Register notice of any new use or intended use of the information...and provide an opportunity...to submit written data, views, or arguments to the agency...

(g)(1) CIVIL REMEDIES.--Whenever any agency
(A) makes a determination ...not to amend an individual's record in accordance with his request;...
(B) refuses to comply with an individual request under (d)(1)...
(C) fails to maintain any record... with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
(D) fails to comply with any other provision of this section...in such a way as to have an adverse effect on an individual, the individual may bring a civil action...

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) ...the court may order the agency to amend the individual's record... or in such other way as the court may direct. In such a case the court shall determine the matter de novo.
(B) The court may assess against the US reasonable attorney fees and other litigation costs...
()3)(A) In any suit brought under the provisions of (g)(1)(B)...the court may enjoin the agency from withholding the records...In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera...
(B) The court may assess against the US reasonable attorney fees and other litigation costs...
(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D)...in which the court determines that the agency acted in a manner that was intentional or willful, the US shall be liable to the individual in an amount...
(i)(1) CRIMINAL PENALTIES--Any officer or employee of an agency...who knowing that disclosure of the specific material is so prohibited, willfully discloses the material...shall be guilty of a misdemeanor and fined...
(2)...who willfully maintains a system of records without meeting the notice requirements of subsection (c)(4) shall be guilty of a misdemeanor and fined...
(j) GENERAL EXEMPTIONS. The head of any agency may promulgate rules, in accordance with the requirements (in-

cluding general notice) of sections 553(b)(1),(2), and (3),(c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6),(7),(9),(10), and (11), and (i) if the system of records is--...

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws...and which consists of...(B) information compiled for the purpose of a criminal investigation...associated with an identifiable individual;

(k) SPECIFIC EXEMPTIONS:--The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1),(2), and (3), (c) and (e)of this title, to exempt any system of records within the agency from subsections (c)(3), (d),(e)(1), (e)(4) (G) (H), and (I) and (f) of this section if the system of records is--...

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section.."

9. 5 U.S.C. 702, Right of review:
"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action...is entitled to judicial review...and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the US"

10. 5 U.S.C. 703..."The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute...If no special statutory review proceeding is applicable, the action for judicial review may be brought against the US, the agency by its official title, or the appropriate officer..."

11. 5 U.S.C. 704..."Agency action made reviewable by statue and final agency action for which there is no other adequate remedy in court are subject to judicial review..."

12. 5 U.S.C. 706..." the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld...

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;...

...the court shall review the whole record...and due account shall be taken of prejudicial error..."

13. 42 U.S.C. 1985(3)..."If two or more persons in any State...conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person...of the equal protection of the laws, or of equal privileges and immunities under the laws...or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the US, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

14. 42 U.S.C. 1986:..."Every person who having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section (42 U.S.C.1985), are about to be committed, shall be liable to the party injured, ...for all damages caused by such wrongful act, which such person by resonable diligence could have prevented; and such damages may be recovered in an action on the case;...and any number of persons...may be joined as defendants in the action."

15. 28 U.S.C. 1331(a) "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests or costs, and arises under the Constitution, laws, or treaties of the US"

16. 28 C.F.R. 16.96(1980)" Exemption of

FBI Systems--Limited Access....
(1) Central Records System...Where compliance would not appear to interfere with or adversely affect, the overall law enforcement process, the applicable exemption may be waived by the FBI.
(b) Exemptions from the particular subsections are justified for the following reasons:...
(2)...from paragraph (d)(2) because to require the FBI to amend information thought to be incorrect, irrelevant or untimely, because of the na nature of the information collected and the essential length of time it is maintained, would create an impossible administrative and investigative burden by forcing the agency to continuously retrograde its investtigations attempting to resolve questions of accuracy, etc."

17. 28 C.F.R. 16.98. "Exemption of Drug Enforcement Administration Systems."